

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6546 of 1993

For Approval and Signature:

Hon'ble MISS JUSTICE R.M.DOSHIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

JAYANTILAL R PARMAR

Versus

NUTAN BHARAT GRAM VIDYALAYA

Appearance:

MR AM RAVAL for Petitioner

MR DK ACHARYA for Respondent No. 1

MS. S.D.TALATI, ASSTT.GP for Respondent No. 2

CORAM : MISS JUSTICE R.M.DOSHIT

Date of decision: 20/02/98

ORAL JUDGEMENT

Petitioner before this Court is former employee of the respondent No. 1 institution (hereinafter referred to as "the Trust") which is run and managed by Nutan Bharati Trust. The petitioner belongs to scheduled caste and was appointed as Lecturer in Economics, a post reserved for scheduled caste employee, under order dated

20th September, 1990. The petitioner, under this petition, challenges the order dated 24th June, 1993 whereunder the service of the petitioner has been terminated by paying him three months' pay and allowances in lieu of notice.

2. It is the contention of the petitioner that the petitioner and some six other teachers of the trust on 21st June, 1993 lodged a complaint before the Commissioner of Higher Education, the respondent No. 2 herein (hereinafter referred to as "the Commissioner") in respect of their harassment at the hands of the management. As a consequence of the said complaint, the service of the petitioner was terminated under the impugned order dated 24th June, 1993. Mr. Raval, the learned advocate appearing for the petitioner has contended that the impugned order of termination of service is actuated by malafide and is punitive in nature. No such order terminating the service of the petitioner could have been made without holding a formal inquiry against the petitioner and without finding him to be guilty of some misconduct. Mr. Raval has further contended that in any view of the matter, if the petitioner's service were required to be terminated on any administrative ground, junior most of such employees should have been first relieved from service. However, in the present case, the petitioner though senior has been discharged from service while some other teacher i.e. one Narayanbhai D. Patel has been retained in service who is admittedly junior to the petitioner. Mr. Raval has further contended that the impugned order is apparently made under paragraph 14 of the instructions issued by respondent No. 2 under cover of its letter dated 4th November/December, 1987 (Annexure "L" to the petition). Mr. Raval has contended that the said paragraph 14 is violative of Article 14 and 16 of the Constitution of India and also of public policy. Same, therefore, requires to be quashed and set aside. He has further submitted that therefore, any action taken under the said paragraph 14 cannot be sustained and requires to be quashed and set aside. Mr. Raval has submitted that the petitioner is, therefore, entitled to be reinstated in service with full back wages. Mr. Raval has also placed on records copy of the Government Resolution dated 21st April, 1994 under which the Government has issued instructions in respect of the service conditions, conduct and discipline of the employees of the Gram Vidyapith. Mr. Raval has submitted that under the said resolution, the provisions like paragraph 14 has not been incorporated. It must, therefore, be believed that paragraph 14 referred to hereinabove has been deleted.

He has, therefore, submitted that in that view of the matter also, the impugned order made under the powers conferred by paragraph 14 cannot be sustained.

Mr. Acharya, the learned advocate has appeared for the trust and denied that the impugned order of termination of service of the petitioner is punitive in nature. He has relied upon the affidavit made on behalf of the trust and has submitted that in view of the existing work load, the trust had excessive staff and there being no adequate number of students in the subject of economics, the petitioner had to be discharged from service. He has submitted that the petitioner has been paid three months' pay in lieu of notice as provided under above referred paragraph 14 and the impugned order, therefore, is neither malafide nor arbitrary and does not call for interference by this Court.

It is undisputed that the petitioner is an employee of the Trust and he has been appointed by the Trust. Questions, therefore, would arise, whether the Trust can be said to be "the instrumentality of the State" and "other authority" within the meaning of Article 12 of the Constitution of India; whether a writ petition under Article 226 of the Constitution of India would be maintainable against the Trust. Mr. Raval has submitted that neither of the respondents has raised contention regarding maintainability of the writ petition and, therefore, the question need not be answered. He has further submitted that even if such a contention is required to be answered, it ought to have been considered at the admission stage and once Rule Nisi has been ordered to be issued, this Court cannot raise the question of maintainability of the petition. I am afraid, I cannot accept the objection raised by Mr. Raval. Maintainability of a writ petition is sine-qua-non for issuance of a writ by the High Court. If a question regarding maintainability of the writ petition is raised, a writ petitioner is bound to establish that the writ petition is maintainable. Such question can be raised even after the rule nisi is ordered to be issued.

Further, even if neither of the respondents takes such a defence, the Court can raise a query in respect of the maintainability of the writ petition.

In answer to the query raised by the Court, Mr. Raval has relied upon the recognition granted to the Trust under order dated 17th October, 1987 and the instructions contained in the communications dated 15th

May, 1989 and 4th November, 1987. The communication dated 15th May, 1989 has been sent by the Commissioner of Higher Education in respect of the staffing pattern in various Gram Vidyapith situated within the State. It also contains certain instructions in respect of the qualification and the number of employees to be employed by such gram Vidyapith and the selection procedure to be followed by such Vidyapith. Under communication dated 4th November, 1987. The Trust has been sent a copy of the rules regarding recruitment and establishment of the Trust which are sanctioned by the Commissioner of Higher Education. It also provides for the rules regarding service conditions, leave, provident fund. Mr. Raval has contended that the instructions contained in these various orders issued by the Commissioner of Higher Education do indicate that the Gram Vidyapith is being financed by the Government, 100% expenditure is borne by the Government by way of grant. Recruitment and the staffing pattern is decided by the Government and the rules in respect of the employees of the Gram Vidyapith are also framed by the Government. Thus, the Government has all pervasive control over the Trust. The Trust is, therefore, essentially an instrumentality of the State and the writ petition against the Trust is maintainable. He has also submitted that in any view of the matter, the Trust caters to the need of the rural people in the State and imparts education in the basic skills like agriculture, cattle farming, poultry, carpentry, etc. Thus, the Trust is performing public duty and, therefore also, writ petition against the Trust is maintainable. In support of his contention, he has relied upon the judgments of the Supreme Court in the matters of Delhi Transport Corporation v. D.T.C. Mazdoor Congress and Others (AIR 1991 SC 101); Anadi Mukta Sadguru Shree Muktajee Vandasjiswami Suvarna Mahotsav Smarak Trust and others v. R. Rudani and others (AIR 1989 SC 1607); Dahyabhai Devjibhai Vasava v/s. Dy. District Development Officer (Rev.) Broach [1979 (2) GLR 678].

Under order dated 15th May, 1989, the Commissioner has sanctioned the extent of staff which can be employed by the Trust. The terms contained in the said order requires that the vacancy in the administrative staff shall be filled in by promotion of the senior most employee and the vacant post of the junior clerk shall be filled in after prior permission of the Commissioner; any vacant post should be filled in keeping in view the work load after obtaining permission of the Commissioner; such vacancy shall be filled in by inviting applications by public advertisement; representative of the Commissioner shall be made present

in the selection committee; the post filled in without prior permission of the Commissioner shall not be admissible for salary grant. The Commissioner shall be one of the members of the governing body of the Trust as a representative of the Government and that all the records shall be maintained by the Trust upto date. Under the Government resolution dated 14th February, 1985, it is provided that the Gram Vidyapith situated within the State is entitled to salary grant equivalent to 100% of the difference of salary paid to its employees and the tuition fees received by it. Under the said resolution, the Government has issued directions in respect of the strength of staff to be maintained by such Gram Vidyapith keeping in view the work load and the number of students. Under the rules referred to in communication dated 4th November, 1987, the Commissioner has issued directions in respect of the conduct, leave, provident fund etc. of the employees of the Gram Vidyapith. Paragraph 3 thereof refers to the presence of the representative of the Commissioner on the Service Selection Committee. It further provides that the appointment order shall be given in writing under signature of the Director of Vidyapith. Said instructions also refer to the other service conditions of the employees of the Vidyapith. Instruction 14 confers upon the Vidyapity power to terminate service of an employee legality of which is challenged herein. Instruction 25 refers to the admissibility of the allowance to the employees of the Vidyapith as determined by the Government from time to time. In case of any deviation from the aforesaid rules, prior permission of the Commissioner would be necessary as per instruction 29. It also contains instructions in respect of leave and Provident Fund applicable to such employees.

On perusal of the above instructions, it is evident that it is the difference of salary expenditure and the tuition fees alone which is admissible for the purpose of grant. Mr. Raval, therefore, is not right in contending that 100% of the salary expenditure is borne by the Government by way of salary grant. Further, it is not brought on the records of the matter that the entire expenditure including salary expenditure of the trust is borne by the Government. On the contrary, it appears that only deficit of the salary expenditure and some of the maintenance expenditure is borne by the Government. The rest of the expenditures like land, building, hostel, cattle, agriculture equipments, other equipments, etc. are required to be shouldered by the Trust itself. Further, since the Government bears the expenditure of salary of the employees of the Trust, the Government is

bound to exercise some control to oversee that the qualified candidates in adequate number are employed by the Trust. For this purpose, the Government has to set minimum standards of qualification and the number of staff keeping in view the number of students and the subjects taught. It appears that the Government exercises minimal control to ascertain that the qualified candidates are employed in adequate number. Presence of the representative of the Commissioner on the Staff Selection Committee would be necessitated for fair and just selection and such control is required to be exercised with a view to preventing favouritism, nepotism, over staffing, exploitation of the employees, etc. Besides, the breach of these terms may at the most result into withdrawal of grant. In my view, therefore, the Government cannot be said to have all pervasive administrative or financial control over the Trust. Further, paragraph 3 of the instructions dated 4th November, 1987 refers to the appointment to be made under the signature of the Director of Vidyapith. It cannot be read to mean that the appointments are issued by the Director of Higher Education as averred by Mr. Raval. Further, it is true that the Trust does cater to the need of the local people by imparting education to the rural people in basic skills. However, imparting of education cannot be said to be a Governmental function. The trust, therefore, cannot be said to be "the other authority" within the meaning of Article 12 of the Constitution nor can it be said to be an instrumentality of the State.

The question whether the Gujarat Cancer Research Institute can be said to be "other authority" within the meaning of Article 12 of the Constitution of India or not was posed before this Court in the matter of Dr. C.A.Shah v. Gujarat Cancer and Research Institute, Ahmedabad (1992(1) GLR 687). The Court, considering various judgments of this court as well as the Supreme Court in paragraph 21 of the Judgment, summarised the tests which should determine status of an organization within the meaning of Article 12 of the Constitution of India. The various tests set out by the Court in paragraph 21 of the judgment, if applied to the Trust also, the Trust cannot be said to be "the other authority" within the meaning of Article 12 of the Constitution of India. The Trust is not established under any Statute; it is a public Trust registered under the Bombay Public Trust Act, 1950; it is not entirely funded by the Government; it is governed by the Governing Board only one of the members of which is the representative of the Commissioner of Higher Education; the Government does not exercise any power of general

supervision over the functioning of the Trust nor it is an instrumentality of the Government for carrying out the governmental functions.

In the matter of Anadi Mukta (supra), the Supreme Court was dealing with the demand of salary made by the employees of the College affiliated to the University for the duties discharged by them. The Court held that the powers of the High Court to issue writ under Article 226 of the Constitution are far wider than those of the Supreme Court to issue such writs under Article 32 of the Constitution of India. Under Article 226, writs can be issued to any person or authority. It can be issued for the enforcement of any of the fundamental rights or for any other purpose. It further held that

"mandamus is a very wide remedy which must be easily available to reach injustice wherever it is found. "

However, while holding so, in paragraph 14 of the judgment, the Court has held that

"if the rights are purely of a private character, no mandamus can issue. If the management of the College is purely a private body with no public duty, mandamus will not lie."

In the present case, the petitioner has complained of unlawful termination of his service and has sought reinstatement in service. In my view, the claim being purely of a private character, no mandamus can be issued against the Trust. The writ petition, therefore, is not maintainable. Mr. Raval has contended that this Court did exercise its jurisdiction in respect of this very matter earlier by issuing notice and even in the Letters Patent Appeal. In my view, the fact that the petition is entertained is no bar in holding that the writ petition against the Trust is not maintainable. The question whether such petition is maintainable or not was neither raised before the Court earlier nor was it examined by the Court. The admission of a writ petition would not confer jurisdiction to issue writ of mandamus upon this Court inspite of lack of such jurisdiction.

I do not agree with the contention of Mr. Raval that the impugned rule 14 being violative of Articles 14 and 16 of the Constitution of India, cannot be challenged before any other forum except by way of writ petition under Article 226 of the Constitution before this Court. It is not true that the rules referred to by Mr. Raval

are statutory rules. Said rules are not framed under any Statute and that they do not partake the character of the statutory rules. Said rules are mere administrative instructions issued upon the Vidyapith in respect of its staffing pattern and the service conditions of its employees. It cannot be said that the validity of the said rules cannot be challenged otherwise than under Article 226 of the Constitution of India before this Court. In the matter of Dahyabhai Devjibhai Vasava (supra), the contention regarding alternative remedy being available to the writ petitioner was raised before the Court at the admission stage and inspite of the said contention, the writ petition was admitted to the Final Hearing. The very contention at the final hearing was not permitted to be raised by the Court. I am of the view that the question of maintainability of the writ petition cannot be equated with availability of an alternative remedy and the aforesaid judgment shall, therefore, have no applicability on the facts of the case. In the matter of Delhi Transport Corporation (supra), a rule like instruction 14 has been held to be arbitrary, ultravires and opposed to public policy.

However, the question of validity of rule 14 has become academic. The instructions issued in respect of the service condition of employees of Gram Vidyapith have been replaced by the instructions contained under Government Resolution dated 21st April, 1994. This Court, need not, therefore, delve upon the constitutionality of the earlier instructions. At this stage, Mr. Raval has also drawn my attention to the judgment of this Court in the matter of Alka Synthetics Ltd. v. Securities Exchange Board of India and others [1997(3) GCD 88]. In the said judgment, this Court has held that the availability of an alternative remedy of appeal is no bar against exercise of jurisdiction under Article 226 of the Constitution of India. Mr. Raval has contended that if this Court can exercise jurisdiction under Article 226 of the Constitution inspite of availability of an alternative remedy available to the writ petitioner, this Court should certainly exercise its jurisdiction under Article 226 of the Constitution of India when no alternative remedy is available to the writ petitioner. As stated hereinabove, the question of availability of an alternative remedy cannot be equated with that of maintainability of writ petition under Article 226 of the Constitution. Further, it cannot be said that the petitioner has no remedy available to him except the one under Article 226 of the Constitution of India.

Further, in the present petition, a question would arise whether the termination of the petitioner's service under instruction No. 14 was punitive and was actuated by malafide as averred by the petitioner or is a discharge simplicitor as averred by the Trust. These being disputed questions of fact, cannot be decided in the present writ petition. Besides, it is not disputed that Shri Narayan D. Patel is junior to the petitioner. However, still a question would be required to be answered whether said Narayan D. Patel taught the same subjects as the petitioner herein and whether instead of the petitioner, service of said Narayanbhai D. Patel could have been spared or not. The question is not that of pure seniority. The question would be considering the number of students and the subjects opted by them, who should be surplus teacher in a given subject. Hence seniority of teachers in particular subject would be the governing factor and not the general seniority of all the teachers. These also being the question of fact, writ petition before this Court cannot be effectively decided.

In view of the above discussion, I hold that the present writ petition preferred against the Trust is not maintainable. Petition is, therefore, dismissed. Rule is discharged. There shall be no order as to costs.

Vyas